88-1877

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1988

RAMON DEAN,

PETITIONER,

VS.

JOHN O. MARSH, JR.

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF, ARGUMENT AND APPENDICES IN SUPPORT
OF THE PETITION FOR WRIT OF CERTIORARI

OF

RAMON DEAN

ADDRESS OF PETITIONER

207 HOLLY HILL ROAD
ENTERPRISE, ALABAMA 36330
(205) 347-5883

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Ramon E. Dean, the Petitioner here and appearing pro se, prays that a Writ of Certiorari issue to review the judgement of the District Court Judge of the Middle District, Southern Division of Alabama entered in the above-entitled case on March 4, 1988 and the affirmance of said judgement by the Court of Appeals of the Eleventh Circuit.

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QUESTIONS PRESENTED

Did the Trial Court err to reversal in finding petitioner, a white male, was not the victim of reverse race discrimination in a discrimination action where the action alleged a violation of 42 U.S.C.A. §2000 (e) through 2000 (e) (17), and more specifically 703 (J) and 2000 (5) (f), otherwise known as Title VII of the Civil Rights Act of 1964, as amended?

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OPINION BELOW

The opionion of the Federal District Court and the concurrence by the Court of Appeals, whose judgment are herein sought to be reviewed, are unreported and are reprinted in the separate Appendix to this Petition, pp. 16.

JURISDICTION

The affirmance judgment of the Court of Appeals of the District Court's Order was entered on 6 January 1989. The petition for rehearing was denied by the Court of Appeals and was entered on 9 February 1989. This is an appeal from the final judgment pursuant to 28 U.S.C.A., § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an alleged violation of 42 U.S.C.A., 2000 (e) through 2000 (e) (17), and more specifically § 703 (J), otherwise know as Title VII of the Civil Rights Act of 1964, as amended, which provide in part that the provisions protecting whites against so-called "reverse" discrimination, are as follows:

> Nothing contained in this title shall be interpreted to require any employer. . .to grant preferential treatment to any individual or to any group because of race, color, religion, sex or national origin. . . on account of an imbalance which may exist with respect to the total number of percentage or persons. . . employed. . . in comparison with the total number of percentage of persons of such race, color, religion, sex or national origin. . . in the available work force. . .

STATEMENT OF THE CASE

Appellant, Ramon E. Dean, a white person, brought this reverse discrimination action in the Federal District Court alleging inter alia, Appellee John O. Marsh, Jr. the Secretary of Army denied him the right to compete for job position(s) and promotion(s) because of discrimination, in violation of 42 U.S.C.A. §§ 2000e through 2000e-17, otherwise known as Title VII of the Civil Rights Act of 1964, as amended. Appellant properly invoked the district court's jurisdiction pursuant to 42 U.S.C.A. § 20002-5 (f) (R. 1, Nr. 1 & 2).

After compliance with and completion of agency administrative procedures and within the time limits prescribed by law Appellant Dean filed this cause, originally as a class action suit requesting relief from the Federal District Court alleging racial discrimination allegedly practiced by Appellee and based upon reprisal and discrimination (R. 1, Nr. 1). Appellee answered the complaint and denied all allegations therein stated by Appellant (R. 1, Nr. 6 & 7). Appellee filed a motion to dismiss the Appellant's allegations in reference to the class action, as pertains to the reprisal action, and (later) a motion for summary judgment with reference to the discrimination complaint itself (R.1, Nr. 10). On the same date Appellee filed the memorandum brief in support of the motion to dismiss (R.1, Nr. 11) and motion for summary judgment along with exhibit(s) 1 through 27 (R. 1, Nr. 11). It was one of the contentions of Appellee through said pleadings that Appellant had processed his complaint through the administrative procedures as an individual claim rather than a class complaint (R. 1, Nr. 11). Appellant submitted that his claim had been filed as a class action deliberately and in such fashion since, as Appellant noted, there were other GS-9 employee(s) involved, who were allegedly denied job opportunity(s in

relation to the same GS-5 PP-12 position(s) as the Appellant sought to compete in. Additionally, Appellant asserted, there were also other white employees at the GS-11 level who were also denied an opportunity to be properly considered along with the Appellant for the two other (GS-12) positions. To any extent Appellee prevailed and the trial court dismissed said class action but allowed the Appellant to go forward with his individual claim. Appellee further argued in his memorandum that Appellant's reprisal charge warranted dismissal due to untimeliness as in filing Appellant did not challenge the Equal Opportunity officier's decision either in the District Court of in the Equal Employment Opportunity Commission (EEOC) (R.1, Nr. 11, page 5, 6, 13 & 14). Appellant argued, as pertains to the reprisal allegations, that through a misunderstanding between the Appellant and the EEO Officer, Appellant was under the impression for a period of time, at least past appeal time limits, that the reprisal complaint was being processed for investigation in that part of the Appellant's initial complaint beginning in December 1983 only, and concerning the other two (GS-12) positions, one in LTC Golley's office and one in LTC McMahan's office only (R. 1, Nr. 19, page 1 & 2). After that fact was discovered, the time limit had passed. Appellant immediately filed a complaint of reprisal with the Office of Special Counsel, an agency of the Merit System Protection Board (R. 1, Nr. 19, page 1 & 2). This action was dismissed and/or referred to the discrimination complaint and no time bar for filing an appeal or placing that action in court was given (R. 1, Nr. 19, page 1 & 2). Said action by the Appellant revised the reprisal claim at the District Court level. (R. 1, Nr. 19, page 1 & 2). The Trial Court disagreed with Appellant's contention and the reprisal claim was dismissed by the trial court prior to the trial of the discrimination action. Regarding the discrimination claim, Appellee claimed that at least five (5) independent investigator(s), hearing officer(s), agency decision-maker(s), and appellate review

officer(s) concluded that Appellant was not the victim of race discrimination (R. 1, Nr. 11, page 6 through 21). Appellee argued that Appellant was unable to establish a prima facie case of discrimination and could not, given the relevant facts, prove that Appellant was treated differently (or mistreated) on account of his race. Appellant's argument in substance was that the facts and evidence showed that the Appellee violated the law by committing prohibited personnel practice(s), and that Appellee was unable satisfactorily to explain said actions by its agents or employee's other than to deny that Appellee's actions were not based upon discrimination but due to simple errors of a large buracracy. Appellant argued that all of said principle agents or employees of Appellee as pertains to decisions made as to this cause are black (R. 1, Nr. 19, page 2 & 9, namely, Mr. Daniels, Mr. Winston, and Ms. Battle) and that because of Appellee's agents over-zealous efforts to place black employees in positions at the Fort Rucker installation, the rights of Appellant Dean were infringed upon and violated to his detriment. Whether or not said infringement was the result of mere oversight and inaccuracy as claimed by Appellee, or was illegal discrimination and reprisal on the part of Appellee, whether by constructive or deliberate acts, were the final issues for the trial court acting as the trier of the facts (R. 1, Nr. 19, page 12). Before trial, but after the pre-trial hearing the parties agreed that the class allegations would be dismissed by consent of said parties. (R. 1, Nr. 19, page1). An order dismissing said class allegations by Appellant (R. 1, Nr. 17) and an order denying Appellee's motion to continue pre-trial and trial were done on 1 December 1987 (R. 1, Nr. 17). The trial judge issued an order setting Appellee's Motion to Dismiss and Motion for Summary Judgment on 15 December 1987, and directing Appellant to submit his brief in response to Appellee's brief by 15 December 1987 (R. 1, Nr. 18). Appellant's response to Appellee's motion (s) to dismiss and for summary judgment, including

Appellants exhibits 1 through 20 was filed 15 December 1987 (R. 1, Nr. 19). The reprisal claim was dismissed and the discrimination claim was allowed heard at trial (R. 2, Nr. 22). Appellant filed his pre-trial brief, again outlining the sequence of events of his case and stating in essence his allegations of violations the prohibitual personnel practice practiced by Appellee which Appellee had never denied nor disaffirmed the existance of. (R. 2, Nr. 21). With regard to Appellant Dean's claim of race discrimination, the Trial Court was of the opinion that Appellant has raised several genuine issues of material fact(s) which precluded judgment as a matter of law on the claim. Those remaining issues were ordered resolved at trial. (R. 2, Nr. 22). On 20 January 1988, Trial Court, sitting without a jury commenced and said trial was completed the following day on 21 January 1988. The Trial Judge rendered its Order and Memorandum Opinion on 4 March 1988 (R. 2, Nr. 26 & 27). Judgment was in favor of Appellee and aginst Appellant Dean and in the Trial Court's Memorandum Opinion said Trial Judge found no evidence of any discrimination on the part of Appellee other than innocent procedural errors or buracratic inaccuracies (R. 2, Nr. 26 & 27). After motion for new trial, the Trial Court denied said motion (R. 2, Nr. 36) and this appeal was perfected to this Honorable Court based on the denial of the Motion for New Trial and the errors complained of in the Trial Court therein (R. 2, Nr. 37 & 38).

THE EVIDENCE

The evidence, petitioner would assert is straight forward and essentially one in which, Appellant as an Army civilian employee at Ft. Rucker, Alabama who had been employed since July 1971, was discriminated against by Appellee, Honorable John Marsh the Secretary of the Army, his agents or assigns, when on about 2 May 1983, said appellant applied for a position at the Ft. Rucker military installation classified as an Equipment Specialist (Electronics) with a GS-1670-05 with promotion potential to a GS-1670-11. The position sought by Appellant then had known specialized training and promotion potential to the GS-12 grade. The administrative record which the Appellant followed and the trial record form which Appellant apealed as his attempts were thwarted, clearly indicate that an individual, namely Perry E. Wiggins, a black male, was allowed by Appellee to compete for job position which was regulated by 42 U.S.C.A. § 2000 (e) (5) (f) (R. 1, Nr. 19, page 6). The administrative appeal record used by the Appellant to support his discrimination contentions and marked as an exhibit to the trial record, indicate factually that on or about 6 October 1983, Perry Wiggins, a black male was hired, improperly appellant would argue, for the position Appellant sought to be allowed to compete for. Appellant would further argue in this Appellant action, as he did in the District Court as evidence of discrimination said vacancy announcement in which said Perry E. Wiggins was hired, was signed by said Perry Wiggins after the closing date for said job vacancy. With these facts in mind, Appellant asserts his contentions in this appellate review of the District Court's action wherein he alleges error in the said District Court's proceedings, both in its factual and legal findings. Namely, appellant asserts that as a white male, he was consistently, and in violation of § 2000 (e) (5), denied the opportunity to even compete for one the employment positions made the basis of the alleged discrimination.

Appellant additionally asserts with regard to this job position that said job placement(s) listings were discriminatory toward appellant even to the point of not allowing said Appellant's name to be submitted. Said job openings were deliberately discriminating toward Appellant and other whites as alleged in this action, and agents of Appellee attempted with apparent success to ensure that black individuals would be placed into said position(s), all violative of Appellant's rights under the United States Constitution and more particularly 42 U.S.C.A. § 2000 (e) (5).

In United States Postal Service Board of Governors v. Aikens, 460 US 71, 75 L. Ed 2d 403, 103, S. Ct. 1478, this Court determined that the Plaintiff in a job discrimination action under Title VII may prove his case by direct or circumstantial evidence and the trier of the fact should consider all the evidence, giving it the weight and credence it deserves. Here, petititioner argues that the trial judge sitting as the trier of the facts, erred to reversal in not following this mandate. The Trial Court should have noted, and the record is replete with evidence in support of Appellant's discrimination claims, and devoid of evidence in Appellee's behalf (that Appellee's reason for the failure to allow the Appellant to compete for the federal job position were for legitimate non-discriminating reasons). The Trial Court in its Order denying Appellant relief misread the facts by following Appellee's smoke screens on the factual issues and by giving credence to the evidence of Appellee's business and ineffectual orgainization. Appellant asserts that the Trial Court's finding is not sufficient to rebut the strong evidence of Appellant. Texas Department of Community Affairs v. Burdine, 450 US 248, 453 US 902 (1981) sets the Trial Court's standards in this cause.

Appellant recognizes that all Courts acting as the trier's of the fact have forced themselves in such cases as here where the issues are both sensitive and difficult to be especially sensitive in affirmative action cases involving

the prohibitions against discrimination as contained in the Civil Rights Act of 1964 to reflect an important national policy. There will seldom be eyewitness testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquirey even more difficult by applying legal rules which were devised to govern "the basic allocation of burdens and order of presentation of proof," Burdin, 450 US, at 252, 67 L. Ed 2d 207, 101 S. Ct. 1089, in deciding this ultimate questions. The law often obligates finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago: "The state of Man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as [460 US 717] anything else." Edington v. Fitzmaurice, 29 CH Dic. 459, 483 (1885).

Appellant additionally asserts, in support of his burden toward convincing the triers of fact here and in the face of the overwhelming facts to his credit, that these alleged discriminatory actions by Appellee, all Department of Army personnel, Appellant's asserts, were not isolated instances of discrimination. Appellant urges this Court to accept the factual basis in finding said discrimination was part of a concepted plan by agents of Appellee to systematically exclude whites from even competing in said job placement(s). On other occasions complained of by Appellant of the discrimination practiced against him and of which the evidence in the trial record is replete with a factual basis of, is the discrimination alleged by Appellee with regard to Appellant individually and aside from the fact said Appellant was a white male. Much of these reprisals are similiar situations that whistle blowers face when they alert superiors to waste and fraud in the federal

bureaucracy. Said incident was occasioned by a 6 December 1983 job referral for which Appellant had applied. On that occasion, the United States Army, Headquarters TRADOC, issued two (2) career referral lists, numbers 125-83 and 126-83 for Equipment Specialist (Electronics), GS 1670-12. Both of these career referral lists, contained the Appellant's name, were not provided to the selecting official for consideration as required by regulation DA CPR 950-1, as per Merit Placement Plan Section 2-1 and 2-1a (R. 1, Nr. 7 through 11 with exhibits included). (R. 1, Nr. 25, Appellants Exhibit 5). Then after improper handling of referrel list No's 125-83 and 126-83, which contained fully qualified candidates, including the appellant, the appellee continued to seek applicants for the two positions until in march 1984 the position was filled from two other list which did not contain the appellant name. The record is silent on appeal as to whether Appellee had ever shown any evidence that Appellant's name was in fact referred to the appropriate selecting officials. Appellant has concluded that his name was not referred in order to preclude his being selected for said job positions. The then EEO counselor, Charles Thomely, could find no evidence that Appellant's name was in fact referred to the appropriate selecting officials (R. 1, Nr. 19, page 7, R. 3, page 76-82). The records of said referrals, which do not contain the Appellant's name do contain the names of two unqualified black males. A white male was selected.

Appellee's discriminatory actions under the guise of affirmative action Appellant would argue, was to force the selections of the black males, while at the same time denying Appellant even proper consideration for said positions because of his race. Further, Appellant would assert, said deletions of Appellant's name from the list of candidates was a reprisal against said Appellant for his previous Equal Employment Opportunity (EEOC) complaint against Appellee.

THE RULINGS BELOW

The District Court ruled that Petitioner failed to show that the Army's reason for selecting the black candidate was discrimination over the non-selection of the white petitioner, namely the petitioner.

The findings were carried forward in the District Court's memorandum opinion. See Appendix to this petition, pp.

The Court of Appeals apparently expressed no disagreement with the District Court's findings, as said decision of the district Court was affirmed per curium in it's order dated 6 January 1989, which was rendered without further comment. The Court of Appeals further denied on petition for rehearing dated 9 February 1989.

REASONS FOR GRANTING WRIT

Certiorari should be granted to correct inequities in the Employment Hiring Practices at Ft. Rucker Army Base with regard to reverse discrimination problems in said governmental agencies with a goal of promulgation of a workable remedy on black-white employee hiring practices.

This case concerns the employment rights of the petitioner, Ramon E. Dean, a white government worker at said Ft. Rucker Army base. A provision of the federal code, namely, § 703 (J) of Title VII in a legislative proviso protects white persons against so-called "reverse discrimination" in minority hiring procedures.

> Nothing contained in this title shall be interpreted to require any employer. . .to grant preferential treatment to any individual or to any group because of race, color, religion, sex or national origin. . . on account of an imbalance which may exist with respect to the total number of percentage or persons. . . employed. . . in comparison with the total number of percentage of persons of such race, color, religion, sex or national origin. . . in the available work force. . .

The job position describing that the type reverse discrimination petitioner has complained of herein, was set out by this Court in McDonald v. Santa Fe Trail Transportation Co. (S. Ct., 1976). There this Court held that a valid claim was stated by the discharged white employee, reasoning:

> Title VII prohibits racial discrimination against the white petitioners upon the same standards as would be applicabel were they Negroes. . . While Santa Fe may

> decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied alike to members of all races' . . . [W]hatever factors the mechanisms of compromise may take into account in mitigating discipline of some employees, under Title VII race may not be among them.

The legality of formal affirmation action programs under Title VII and § 703 (J) was addressed in United Steel Workers of America V. Welser (S. Ct. 1979). There and at 29 CFR Part 1608 where the EEOC (where EEOC affirmative Action Guidelines were spoke of) used its own guidelines to avoid a reverse discrimination suit, this Court spoke of the legal requirement where an action could be sustained to avoid a reverse discrimination siut, as here presented. But the facts herein that Petitioner would present are different from those cited cases and certainly distinguishable from the instant cause. The facts and evidence in the instant case are sufficient for Petitioner to avoid a "good faith" reliance defense by the Army, respondent herein. § 713 (J). This case is certainly, petitioner would assert, a § 703 (J) reverse discrimination case as provided by Statute, and should be distinguished from the affirmative action baring excpetions as set out in Steelworkers, supra., and this instant cause would provide this Court to enumerate the proper guidelines in similar areas, such as in the facts and circumstances instant cause provide.

Therefore, the Petitioner prays that the Writ will be granted.

Respectfully submitted,

Ramon Dean
Petitioner

APPENDICES

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-7382

RAMON EDWARD DEAN,

Plaintiff-Appellant,

versus

JOHN O. MARSH, JR., in his official capacity as Secretary of the Army,

Defendent - Appellee.

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING

(February 9, 1989)

BEFORE: VANCE, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appelant is Denied

ENTERED FOR THE COURT:

Robert S. Vance
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-7382
Non-Argument Calendar

D.C. Docket No. 87-643

RAMON EDWARD DEAN,

Plaintiff-Appellant,

versus

JOHN O. MARSH, JR., in his official capacity as Secretary of the Army,

Defendent - Appellee.

Appeal from the United States District Court for the
Middle District of Alabama

January 6, 1989

BEFORE: VANCE, KRAVITCH and ANDERSON,
Circuit Judges.

PER CURIAM:

From our consideration of the briefs and record in this case we conclude that the district court's findings of fact are not clearly erroneous and that its rulings of law have not been shown to contain reversible error. It follows that its judgment must be

AFFIRMED.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

RAMON E. DEAN,	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-T-643-S
	)	
JOHN O. MARSH, JR., etc.	)	
	)	
Defendent.	)	

MEMORANDUM OPINION

Plaintiff Ramon E. Dean, a white person, has brought this cause of action claiming that defendant John O. Marsh, Jr., Secretary of the United States Army, denied him promotions because of his race, in violation of 42 U.S.C.A. §§ 2000e through 2000e-17, otherwise known as Title VII of the Civil Rights Act of 1964, as amended. Dean has properly invoked this court's jurisdiction pursuant to 42 U.S.C.A. § 2000e-5 (f). Based upon the evidence presented at a non-jury trial on January 20-21, 1988, the court concludes that it must deny Dean's claim.

I.

In 1983, plaintiff Dean was an electronics technician at Fort Rucker for the United States Army. His GS-9 position had no promotion potential, but his previous work at the GS-11 level qualified him for employment at the GS-12 level if he could find a position. Several positions, with potential for promotion for Dean, opened up at Fort Rucker during 1983-84 but the Army did not select Dean to fill any of them. Dean contends that he was not selected because of his race.

A. Lieutenant Colonel McMahan's Equipment

Specialist GS-5 Position

Although he applied for it, Dean was not even considered for an equipment specialist's position that opened up in Lieutenant Colonel McMahan's command in 1983. Originally a GS-12 position, it was "restructured" by a position review team to level GS-5. According to McMahan, the Army's purpose in doing so was to increase minority representation in the upper levels of the civil service by preparing them through "internships' to compete for higher positions. There were at that time few if any blacks at Fort Rucker eligible to compete for equipment specialist positions at the GS-11 or GS-12 levels.

The "target grade" or "non-competitive" promotion for the restructured position was initially set a GS-11 but it was later reduced to GS-9, which was the usual target grade for GS-5 positions. Even with this second restructuring, however, it was still understood that the position had promotion potential back to the original GS-11 or 12 level. Promotion beyond the GS-9 level would be "competitive," of course, but it was generally understood that the on-the-job experience between GS-5 and GS-9 would give the incumbent a slight advantage over others.

Because advancement to the GS-12 level was possible through this position, several white GS-9 equipment specialists, including Dean, asked to be considered for it. Their names were not referred to McMahan, however, because the position did not offer them potential for "non-competitive" promotion. Also, the Army argues that Dean did not follow a special procedure that required that he fill out a special form requesting a lateral transfer or demotion. In any event, Dean was informed that he would be allowed to compete for the position if it was opened up for competitive promotion to the GS-ll or 12 level.

McMahan selected a black civil servant, even though his application was received after the closing date

established by the job opportunity announcement. The black applicant was less qulified than Dean.

B. Lieutenant Colonel McMahan's Equipment Specialist Postition (GS-12)

McMahan also had a GS-12 equipment specialist opening which had not been restructured, but Dean's name was not referred for this position either. Dean's name was initially referred, but the referral list was returned because those referred did not have impressive qualifications. Based on a new referral list, McMahan filled the position with a white applicant, who was better qualified than Dean for the position.

C. Lieutenant Colonel Golley's Equipment Specialist Positions (GS-12)

Lieutenant Colonel Golley had two GS-12 positions to fill. Dean was qualified for only one, however, and admits that the Army properly rejected him for the other. Colonel Golley did receive a referral with Dean's name on it, but all the candidates were rejected for insufficient qualifications. Dean's name also appeared on another referral list, but a black individual was selected by Golley. The black was better qualified than Dean.

II.

In Title VII case, where the evidence is circumstantial, a plaintiff has the initial burden of establishing a prima facie case of racial discrimination by a preponderance of the evidence, Texas Department of community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981), which once established raises a presumption that the defendant discriminated against the plaintiff in employment. 450 U. S. at 254, 101 S. Ct. at 1094. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to rebut the presumption by producing sufficient evidence to raise a genuine issue of fact as to whether the defendant discriminated against the plaintiff. This may be done by the defendant articulating

a "legitimate, nondiscriminatory reason" for the employment decision, a reason which is "clear and reasonbly specific" and worthy of credence. 450 U.S. at 253, 257-258, 101 S. Ct. at 1093, 1095-96. The defendent has a burden of production, not one of persuasion, and thus does not have to persuade a court that it was actually motivated by the reason advance. 450 U.S. at 254, 101 S. Ct. at 1094. Once the defendant satisfies this burden of production, the plaintiff then has the burden of persuading a court that the proferred reason for the employment decision is a pretext for racial discrimination. The plaintiff may satisfy this burden by persuading the court either directly that a racially discriminatory reason more likely motivated the defendant or indirectly that the proffered reason for the employment decision if not worthy of belief. 450 U.S. at 256, 101 S. Ct. at 1095. By so persuading the court, the plaintiff satisfies his ultimate burden of demonstrating by a preponderance of the evidence that he has been the victim of intentional racial discrimination.

III.

The court need not reach the issue of whether Dean has established a prima facie case as to the positions he seeks, because, assuming he has, he has still not established that he has been the victim of race discrimination. In other words, the Army has articulated legitimate, non-discriminatory reasons for not selecting Dean for these positions, and Dean has not shown these reasons to be a pretext for race discrimination. See United States Postal Service Board of Governers v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482 (1983) (whether plaintiff has established a prima facie case "is no longer relevant" where "the defendent has done everything that would be required of him if the plaintiff had properly made out a prima facie case" and district court has before it all the evidence it needs to decide whether defendant

intentionally discriminated against plaintiff.)

A.

The Army restructured the first position to GS-5, and subsequently reduced the target grade from GS-11 to GS-9, in keeping with a consent decree designed to promote affirmative action. It is now well established that employers may in appropriate cases attempt to eradicate racial discrimination through race-conscious relief even if all beneficiaries were not actual victims of discrimination. See Local No. 93, International Association fo Firefighters v. City of Cleveland, _____ U.S. _____, 106 S. Ct. 3063 (1986); Sheet Metal Workers v. E.E.O.C., _____ U.S. _____, 106 S. Ct. 3019 (1986): Steelworkers v. Weber, 443 U.S. 193, 99 S. Ct. 2721 (1979). The Army lawfully restructured this position.

The dicision not to refer Dean for consideration for this position was nondiscriminatory. McMahan's desicion was based purely on the qulifications of the applicants. Although the position was restructured downward to open up opportunities for blacks, both blacks and whites were to compete for the position on an equal basis. The court is convinced that, pursuant to policy, McMahan selected the black person because of his qulifications and not because of his race.

To be sure, the black person selected was allowed to apply after the closing date established by the job opportunity announcement. The black person was, however, afforded this opportunity not because of his race, but because he belonged to a non-racially identifiable group of applicants who were not subject to the job opportunity announcement's closing date.

Moreover, the refusal to consider Dean and other similarly situated applicants for the position was not racially motivated. While this group of ineligible applicants was all white, the basis for rejecting them was not racial. The Army reasonably concluded they should

not be allowed to compete when the position opened up for competitive promotion. To be sure, if the position did open up for competition for a GS-11 or 12 level, a person selected at the GS-5 level and promoted to GS-9 had a slight, unwritten advantage over another GS-9 person from without. The court concludes, however, from an assessment of all the evidence that this advantage was not part of a scheme to promote blacks over more qualified whites. The court believes that, while the unwritten advantage may be true in some cases, the Army intended that when the incumbent reached GS-9, he would compete with all other GS-9 applicants equally. Moreover, the intent behind the restructuring of the position was not to limit the number of white applicants but to increase the number of black applicants. While, as a result of the restructuring, Dean and other white applicants similarly situated to him could no longer apply for the positions, other white applicants, who before the restructuring were not eligible, became eligible and competed with black applicants on an equal footing. The black person selected for the GS-5 position was selected because he was more qualified than the other blacks and whites competing for the position, not because of his race.

Furthermore, it appears that, even though the restructured GS-5 position was not open to Dean and others similarly situated, there was a 'special' procedure he could have used that might have allowed him to apply for the position. Dean should be faulted for not pursuing this procedure are immaterial. The evidence clearly reflects that the Army did not want to make the position available to people in Dean's circumstances, but the reason behind the Army's decision was non-racial.

Finally, it appears that the Army bureaucracy did not fully cooperate with Dean's EEO counselor in pursuing Dean's administrative charges of discrimination. While disappointing, the court is not convinced that this failure reflects a desire or plan by the Army to categorically exclude whites for consideration for the restructured

position. Dean eventually obtained almost all the paperwork he wanted, and he did not prove that the Army withheld anything in its possession. Dean's EEO counselor had problems investigating several other cases as well. Dean would have the court believe that Army personnel are engaged in a conspiracy to cover-up race discrimination against him, but the court finds it much more likely that the Army bureaucracy simply has trouble keeping track of its own procedures and proceedings. Dean probably has been victimized by innocent prodecural errors, but Title VII actions are not the proper vehicle for dealing with them.

B.

The candidate eventually selected for Lieutenant Colonel McMahan's unrestructured GS-12 position was not only white but, more importantly, was also better qualified. Dean has not shown that the Army's reason for selecting someone else--that he was better qualified than Dean--was a pretext for race discrimination.

C.

As for Lieutenant Colonel Golley's GS-12 position, Dean has again failed to establish that the Army's stated reason for its decision was pretext. According to the Army, the black candidate selected simply was better qualified for the position than Dean.

The basis for Dean's claim is that Golley really did not receive a referral list with Dean's name on it; or if he did receive it, he did not consider it because it looked like referral lists which already had been rejected. Dean tried to link all this to race discrimination on the theory that Golley was sent short and repetitive referral lists designed to force the selection of a black applicant.

The evidence reflects that Golley did receive a referral with Dean's name on it, that he did consider Dean for the

position, but that Dean lacked all the qulifications required. Golley needed someone with significant avionics as well as electrical experience. Dean does not have much experience with avionics. Golley often received inadequate referral lists and rejected them; the lists were often inadequate or repetitive because there were only so many candidates available locally. Widening the recruitment process takes more time and paperwork. To the extent that Dean was prejudiced by problems with the referral lists, the court finds that this resulted form bureaucracy rather than a deliberate scheme to discriminate. Dean has failed to show that the Army's reason for selecting the black candidate--that he was more qualified than Dean--was a pretext for discrimination.

An appropriate judgment will be entered.
DONE, this the 4th day of March, 1988.

Myron Thompson
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Ramon Dean, Petitioner, do hereby certify that on this the 09 day of May, 1989, I did serve the requisite number of copies of the foregoing on all parties of interest, by mailing the same to said parties, first-class and postage prepaid.

Ramon R. Dean

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Petitioner

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No. 88-1877

In the Supreme Court of the United States

OCTOBER TERM, 1989

RAMON DEAN, PETITIONER

v.

MICHAEL P. STONE, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's findings that the Army's failure to hire petitioner for certain jobs was not the result of racial discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15) is unpublished, but the decision is noted at 866 F.2d 1423 (Table). The opinion of the district court (Pet. App. 16-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1989. A petition for rehearing was denied on February 9, 1989. Pet. App. 14. The peti-

tion for a writ of certiorari was filed on May 10, 1989. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, petitioner, who is white, was an Army electronics technician at Fort Rucker, Alabama. His position, classified at the GS-9 level, held no potential for further promotion. He had previously worked at the GS-11 level, however, and that experience qualified him for employment at the GS-12 level if he could find a GS-12 position. During 1983 and 1984, several positions became available at Fort Rucker that might have led to a GS-12 promotion for petitioner, but the Army did not select petitioner for any of them. Pet. App. 16.

Petitioner first applied for an equipment specialist's position in 1983. Originally classified at the GS-12 level, the position had been reclassified to level GS-5. The Army's purpose in doing so was to increase minority representation in the upper levels of the civil service by providing for lower level internships that would prepare the incumbents to compete for higher level jobs. The equipment specialist position was defined so that, although entry would be at the GS-5 level, noncompetitive promotions would be available up to GS-9, the "target grade" for the job. Beyond that level, promotion would be available to GS-11 or GS-12, but only on a competitive basis. It was generally understood that on-the-job experience would give the incumbent a slight advantage over other applicants. Pet. App. 17.

Because advancement to the GS-12 level was ultimately possible, several white employees at the GS-9 level, including petitioner, asked to be considered for the GS-5 equipment specialist position, but their

names were not referred to the commanding officer. The Army explained that the GS-9 applicants were not eligible for the position at that time because the job did not offer them the potential for non-competitive promotion: GS-9 was the maximum non-competitive promotion level of the job, and the applicants were already at that level.[1] Petitioner was informed, however, that he would be allowed to compete for the position if it was opened up for competitive promotion to the GS-11 or GS-12 level. Pet. App. 17. Ultimately, a black civil servant was chosen for the equipment specialist position, although he was less qualified than petitioner. *Id.* at 17-18.[2]

Petitioner also applied for another GS-12 equipment specialist position, one whose grade level had not been reduced. Petitioner's name was initially placed on the list of names being referred to the commanding officer, but the list was returned because the applicants on the list were found to have insufficiently impressive qualifications. A new referral list was prepared, and the job was filled by a white applicant whose qualifications were superior to those of petitioner. Pet. App. 18.

Petitioner applied for two other GS-12 equipment specialist positions as well. He has admitted that the Army properly rejected him for one of those posi-

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[1] In addition, petitioner failed to follow proper procedures for requesting what for him would have been a lateral transfer or demotion. Pet. App. 17.

[2] The selected person's application was received after the closing date specified by the job opportunity announcement. Pet. App. 17-18. But the district court subsequently found that the closing date did not apply to one non-racially identified group of applicants, of which the selected individual was a member. *Id.* at 20.

tions. Pet. App. 18. With respect to the other, one referral list included petitioner's name, but all of the listed applicants were rejected for insufficient qualifications. Although petitioner's name appeared on another referral list, a black individual, who was better qualified than petitioner, was selected. *Ibid.*

2. Petitioner subsequently brought suit in the Middle District of Alabama, claiming that the Army impermissibly denied him the promotions in question because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* After trial, the district court rejected the claim. The court concluded that petitioner had not shown that he was the victim of discrimination, explaining that the Army had "articulated legitimate, non-discriminatory reasons for not selecting [petitioner]," and petitioner "has not shown these reasons to be a pretext for race discrimination." Pet. App. 19.

With respect to the equipment specialist position that had been reclassified as a GS-5 position, the court first found that the reclassification, which was carried out pursuant to a consent decree designed to promote affirmative action, was lawful. Pet. App. 20. The court then found that the decision not to refer petitioner for selection for the position was not racially motivated. The court found that all applicants were judged without regard to race if they were eligible for the job and that the eligibility criterion that excluded petitioner—that the GS-5 position must have non-competitive promotion potential (up to the GS-9 target grade) for any applicant, thus excluding applicants already employed at GS-9 or above (*id.* at 17)—was not racially motivated. *Id.* at 20-21. The court also found that any such excluded applicant could apply for the position when it opened up for

competition above the GS-9 level and that, although incumbents would have a slight advantage over outside competitors, the Army intended that the competition would be equal. *Id.* at 17, 21.

The district court similarly rejected petitioner's challenge to the Army's refusal to select him for the two other positions that petitioner continued to place at issue. The court found that each was filled by an individual who was better qualified than petitioner. The court also concluded that petitioner had not shown that the selection in either case was a pretext for race discrimination. Pet. App. 22-23.

3. The court of appeals affirmed. The court stated simply that the district court's findings of fact were not clearly erroneous and that its rulings of law did not contain reversible error. Pet. App. 15.

ARGUMENT

The court of appeals' decision affirming the district court's rejection of petitioner's discrimination claim does not warrant this Court's review. The decision is entirely factbound. It does not conflict with any decision of this Court or of any other court. And petitioner's challenge to the correctness of the decision is without merit.

The district court correctly rejected petitioner's discrimination claim with respect to the two GS-12 jobs for two simple reasons. One was filled by a white person; as to that position, petitioner did not even establish a prima facie case of race discrimination against him. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). Moreover, for both positions, the Army selected persons

other than petitioner because they were better qualified than petitioner.[3] As the district court found, petitioner failed to establish that the Army's reliance on such superior qualifications in making its selections was a pretext for discrimination. Pet. App. 22-23.

With respect to the position that was reclassified at the GS-5 level, the district court correctly found that the Army's decision not to select petitioner likewise was not unlawfully discriminatory. Both white and black persons were in the group of persons who met the criteria for consideration (see DX 11), and the selection from that group was made without regard to race and on the basis of the candidates' qualifications (Pet. App. 20). And the Army's decision to reclassify the position and its adoption of the criterion that excluded petitioner from consideration—that the position must give applicants the potential for non-competitive promotion above their current level, thus excluding all persons currently classified at GS-9 or above—were themselves lawful.

The Army's reclassification and selection-criterion decisions were made in order to carry out an affirmative-action consent decree (*Matthews* v. *Alexander*, Civ. No. 76-44-S (M.D. Ala. Apr. 6, 1979)). Although the decisions were aimed at increasing black representation in the Army work force, the Army's job selection criteria were themselves race-neutral. The Army did not use race to choose among candidates. Rather, the Army simply eliminated

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[3] With respect to one of the positions, the district court explained that the person selected had more experience in avionics than petitioner. Pet. App. 23. The Army had the same basis for its selection with respect to the other position. See 2 R. 26.

from the competition persons who, because of experience, had greater qualifications than needed for the position; it thereby provided that *all* persons with less experience, but with sufficient qualifications, would have a better chance of entering the Army work force. The Army's decision not only was race-neutral in operation, but the district court found that it was not motivated by a desire to exclude whites. Pet. App. 21.[4] Indeed, while one consequence of the Army's action was to eliminate some white persons from consideration for the job, the Army's decision also enabled some other, otherwise-ineligible white persons to compete, equally, for the job. In these circumstances, the Army's action in applying the race-neutral promotion-potential criterion after reclassifying the position to the GS-5 level was consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Cf. *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706, 738 (1989) (Scalia, J., concurring in the judgment) (noting lawfulness of programs that use race-neutral means, as opposed to racial classifications, to remedy past discrimination, such as a program that gives a preference to small or new businesses in order to aid those excluded by past discrimination).

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[4] Although it was "generally understood" that, if the GS-5 position opened up for competitive promotion above the GS-9 level, incumbents would have a slight advantage (Pet. App. 17), the district court found that the Army's intent was that such competition—for which petitioner would be eligible—would be on an equal footing (*id.* at 21).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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